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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 631

CONTINENTAL CASUALTY COMPANY,
as subrogee of ATLANTIC AND GULF
STEVEDORES, INCORPORATED,
Petitioner,
v.
STEAMSHIP "BENNY SKOU" in rem,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOS. M. JOHNSTON
Of Counsel for Respondent

Norfolk, Virginia
March 23, 1953

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STATEMENT

The history of this litigation goes back to March 9, 1949. At that time petitioner filed an in personam libel against Thorden Lines, a Swedish corporation, and Ove Skou, owner of the steamship BENNY SKOU to recover damages for the death of James Bright, Jr. under the provisions of the Jones Act, 46 U.S.C.A. 688.

On March 3, 1950, libellant amended the libel by adding a claim under the Virginia Death by Wrongful Act Statute. The District Judge dismissed this in personam libel upon the grounds that it could not be maintained under the Jones Act because Bright was not an employee of either Thorden or the BENNY SKOU, and it could not be maintained under the Virginia statute because not brought within the limitation of one year therein prescribed. Upon appeal, the Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court. (*Continental Casualty Co., etc. v. Thorden Line, etc.*, 186 F. (2d) 992).

The petitioner filed the instant suit on March 20, 1951, arresting the BENNY SKOU upon a libel *in rem* seeking to recoup its payments made pursuant to awards under the provisions of the Longshoremen's and Harbor Workers' Act, Title 33 U.S.C.A. Sec. 901 et seq. The petitioner founded its *in rem* action on the provisions of the Virginia Death by Wrongful Act Statute, (Va. Code 1950, Sec. 633, 634).

The District Court dismissed the new action holding that it came too late under the provisions of the Virginia Statute, and the Court of Appeals for the Fourth Circuit affirmed the decision of the District Judge.

In addition to the litigation summarized above, Continental Casualty Company filed a libel in August of 1949 in the United States District Court for the

Southern District of New York attaching a vessel belonging to Ove Skou, owner of the BENNY SKOU. The New York proceeding was on the same cause of action and bond in the amount of $35,000 was posted to release the vessel from attachment. On May 29, 1950 petitioner obtained entrance of a consent order discontinuing the New York proceeding and releasing the security which had been posted in that cause.

The purpose of the petitioner's application for writ of certiorari is to have this Court review the decision of the Court of Appeals for the Fourth Circuit which was rendered on December 3, 1952, in favor of the respondent. The opinion of the Court of Appeals is printed as part of the Transcript of Record (R. 35) and is reported in 200 Fed. (2d) 246.

The opinion of the District Court which was affirmed by the Court of Appeals is also printed as a part of the Record (R. 18) and is reported in 101 Fed. Supp. 15.

FACTS

James Bright, Jr., was a longshoreman employed by Atlantic and Gulf Stevedores, Incorporated. This stevedoring company was engaged to do stevedoring work in connection with the loading of cargo on board the steamship BENNY SKOU in the harbor of Norfolk, Virginia.

On September 6, 1947 while working on board the steamship BENNY SKOU, James Bright, Jr. fell into an open hatchway and was killed. Atlantic and

Gulf Stevedores, Incorporated, the employer of James Bright, Jr., carried insurance which covered compensation for injuries to its employees, and claim was made before the United States Deputy Commissioner under the Longshoremen's and Harbor Workers' Act for that compensation. At this hearing the mother and widow of James Bright, Jr. elected to receive compensation rather than institute proceedings against a third party.

The deceased longshoreman's widow and mother accepted an award on December 10, 1947 and as of that date Continental Casualty Company, the insurance carrier for the stevedoring company, was subrogated to the rights of Bright's survivors.

Continental Casualty Company filed its *in personam* libel in March of 1949. The *in rem* action which is the subject of the instant litigation was first filed on March 20, 1951, more than three years after the death of Bright.

ISSUE

The sole issue in this application for certiorari is:

Under the facts of this case, did the absence of the steamship BENNY SKOU from the Eastern District of Virginia toll the one year limitation of the Virginia Death by Wrongful Act Statute when the right of Action was enforced by a libel in rem against that vessel?

ARGUMENT

The Virginia Statute under which the Casualty Company has sought to recover in its various libels, both in Virginia and in New York, is as follows:

"Va. Code 1950—Sec. 8-633. Action for death by wrongful act—Whenever the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, or of any ship or vessel, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed *in rem* against such ship or vessel, or *in personam* against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel *in rem,* and her owners or those responsible for her acts or defaults or negligence to a libel *in personam,* notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. And any right of action which may accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured person.

"Every action under this section shall be brought within one year after the death of the injured person, notwithstanding the provisions of Sec. 8-24."

Section 8-24 to which reference is made in the last paragraph of the Virginia Death Statute, pertains to the time limitation for the filing of general actions.

A. The Expressed Limitation of the Virginia Statute Must Be Enforced in the Admiralty Action

Co-existant with the right of action created by Section 8-633 of the Virginia Code is the mandatory provision that every action under the statute shall be brought within one year after the death of the injured party.

This is a well recognized principle and was forcefully stated by the Court of Appeals for the Fourth Circuit when Continental Casualty Company was first before that court in January 1951, seeking recovery from The Thorden Line under the Virginia Death Statute. The BENNY SKOU, 186 F. (2d) 992, 997:

> "(4, 5) * * * * * * The statute provides that every action thereunder must be brought within one year after the death of the injured person; and it is settled in such a case that 'The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all' ".

Does the fact that the new action is a libel *in rem* preclude the application of this principle? Obviously *it does not.*

The libellant argues that the Virginia statute provides or creates two causes of action; one, *in personam* against the owner, and one *in rem* against the vessel itself.

The wording of the statute in fact does permit the estate of the injured party to proceed *"in rem* against such ship or vessel, or *in personam* against the owners thereof."

The point is that the Virginia Statute created and bestowed upon admiralty a right to grant a recovery not previously existing. It created this right expressly subject to the restriction that *"every action under the section shall be brought within one year after the death of the injured person"*. This is true regardless of the basic difference between *in rem* and *in personam* actions.

In the case of *Monvel v. N.&W. Ry. Co.,* 99 Va. 188, 37 S.E. 957, the Supreme Court of Appeals of Virginia held the one year limitation applicable and binding on the plaintiff who, through a voluntary nonsuit, allowed the twelve month period to pass before instituting a new action, *even though the original action had been brought within the required time.*

In *Dowell v. Cox,* 108 Va. 460, 62 S.E. 272, the Virginia Supreme Court approved the language of the Supreme Court of Carolina construing that State's Death by Wrongful Act Statute.

"This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, *but any explanation in that respect would be unavailing,* as there is no saving clause as to the time within which the action must be begun". (Taylor v. Cranberry Iron & Coal Co., 94 N.C. 525, 526). (Italics ours).

There is nothing in the Virginia Statute which excludes an *in rem* action from the effect of the limitation or gives it a preference not enjoyed by suits against the person. To the contrary, the terms of the limitation are all inclusive.

The HARRISBURG, 119 U.S. 199, 214, 7 S. Ct. 140, 147 dealt with the application of the Pennsylvania Statute in the Admiralty Court, in an *in rem* action.

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * It would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have

been made a part of its existence. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitation of the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

See also, *Klingseisen v. Costanzo Transportation Co.* (3rd Cir.), 101 F. (2d) 902, and *Truelson v. Whitney & Badden Shipping Co.* (5th Cir.), 10 F. (2d) 412, in which the admiralty court, in a death action, applied the state law of contributory negligence barring recovery.

In *Western Fuel Co. v. Garcia,* 257 U.S. 233, 42 S. Ct. 89, this Court specifically held that the District Court should have applied the state statutory limitation in applying the California Death by Wrongful Act Statute. The facts of the Garcia case and the instant litigation are strikingly similar. The libellant, in the Garcia case, instituted its admiralty action *within fifteen days* after an adverse decision of the Supreme Court of California setting aside an award under the California Workmen's Compensation Act, and within one year and sixteen days after the death of the libellant's decedent. Yet, this Court *denied the District Court's right to ignore the California limitation of one year* and remanded the cause with instructions to dismiss the libel. From the standpoint of an equitable

excuse for failure to file timely action, it is difficult to see how the libellant in the Garcia case could have been on much stronger ground.

The District Court's statement concerning the Garcia case follows:

> "In Western Fuel Co. v. Garcia, 257 U.S. 233, the Court was faced with that problem squarely, yet denied admiralty's power to be so indulgent. Synopsis in the report of the briefs of counsel plainly indicate that the very contention now made was there unavailingly relied on, that admiralty substitute the rule of laches for the uncompromising limitation in the death act. The unexcused delay was due to the deferment of the suit until termination of litigation of the same cause of action as a claim for compensation before the State Commission and the State Supreme Court."

From the foregoing it is obvious that the difference between *in rem* and *in personam* actions does not furnish valid basis for accepting and enforcing in admiralty the remedy afforded by the State Statute but refusing to apply the limitation which is a part of the same statute.

B. There Is No Valid Excuse for Petitioner's Failure to File Its In Rem Action Within the Time Allowed by the Virginia Statute

In this action the BENNY SKOU was arrested in March of 1951—almost three and one-half years after the death of Bright, to whom petitioner is subro-

gated. The petitioner argues that it was not guilty of laches, and alleges that its only available remedy was to attach the offending vessel and enforce the *in rem* lien created by the Virginia Act.

Whether we apply the laches doctrine or seek a justifiable excuse for the delay in filing suit, the facts here do not excuse the petitioner. Continental Casualty Company maintains offices in the Cities of New York, Philadelphia, Baltimore and Norfolk (R. 25). It maintains competent legal representation in the Port of Norfolk (R. 12).

On December 10, 1947 the widow and daughter of the deceased longshoreman elected to accept an award under the Longshoremen's and Harbor Workers' Act rather than institute proceedings against a third party. That same date, the Casualty Company was subrogated to the rights of Bright's estate to proceed against the BENNY SKOU.

The petitioner argues that after it became Bright's subrogee the vessel was not within the Norfolk District again until March 20, 1951; it contends that this is a valid excuse for its failure to file this suit until over three years after it became subrogee.

Regardless of whether or not the vessel returned to Norfolk in November of 1947 within two months of the death of Bright (R. 32), it is stipulated that the

BENNY SKOU made nine visits to New York, eight visits to Baltimore, and three visits to Philadelphia between September 7, 1947 (the date of Bright's death) and March 20, 1951, the date when the *in rem* libel was filed (R. 9, 10). In each of these cities the petitioner maintained offices (R. 8), and had ample opportunity to arrest the vessel within the statutory time provided.

The District Courts of Pennsylvania, New York and Maryland could, and undoubtedly would, have enforced its action.

The HARRISBURG (Supra)
Stewart v. B. & O. R.R. Co., 168 U.S. 445
Weissengoff v. Davis (4th Cir.), 260 F. 16
Lauria v. E. I. DuPont, etc. (2nd Cir.), 241 F. 687

Moreover, there is no question in the instant case of relegating the petitioner to a personal judgment against foreign owners and thus leaving it without security or property from which any judgment obtained could be collected. The New York proceeding in which a $35,000 bond was posted was dismissed by consent and thus disposes of this contention.

In addition, the BENNY SKOU actually called in ports where the petitioner maintained offices on twenty separate occasions between Bright's death and the filing of this *in rem proceeding,* almost three and one-half years later.

The petitioner relies heavily on the case of *Scarborough v. Atlantic Coast Line R.R. Co.,* 178 F. (2d) 253, which was decided by the Fourth Circuit.

The Scarborough case involved a question of fraud. The Court there held that the three year limitation in an action under the Federal Employers Liability Act was tolled by the alleged delibate fraud of the defendant's claim agent. The plaintiff, who was an infant was persuaded, and the court held fraudulently so, to delay the filing of his action beyond the three year period. The court held that the facts plainly disclosed that the action of the claim agent was fraudulent and deliberate, and was for the purpose of extending the time beyond the statutory limitation. The Fourth Circuit Judge in speaking of this situation said:

> "The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the frame work of our law to be set aside by a legalist distinction between the closely related types of statutes of limitation."

This is a very different situation from the instant case where, in the words of the District Court in the Thorden Line case, "Here we have no deception or other fraud". (R. 24).

In the absence of fraud, as illustrated in the Scarborough case, supra, or war conditions rendering it impossible for the plaintiff to comply with the provisions of the statute, as shown by the case of *Osbourne v. United States,* 164 Fed. (2d) 767, 768, the courts have uniformly held litigants to the limitations of the statutes.

One of the important reasons for the strict enforcement of the statutory limitation is the invarable prejudice to respondents caused by undue delay in instituting proceedings to enforce a claim.

McGrath v. Panama R.R. Co. (5th Cir), 298 Fed. 303

Marshall v. Natl. Mercantile Marine (2nd Cir.), 39 F. (2d) 551

Cal. Casualty Indemnity Exchange v. U.S.A., 74 Fed. Supp. 401, especially at page 404.

In the case of *Mejia et al v. U. S.* (5th Cir.), 152 Fed. (2d) 686, 688, it was held that correspondence between libellant and government agencies dealing with compromise was insufficient to justify delay in instituting suit.

> "The cause of action was known to the libellants; and while they spent considerable time writing letters to government agencies in an attempt to compromise their claim, they were at no time misled or lulled into a sense of security or led into the belief that their claim would be compromised."

The GLENDALE, 81 F. 633, cited by petitioner, held no more than that the Virginia Statute gave an *in rem* lien in wrongful death actions which could be enforced in admiralty. In fact, the court recognized that jurisdiction depended on the Virginia statute. No question was raised in that case on the point of delay in filing the action.

C. The Instant Case Presents No Conflict of Authority on the Legal Principle Involved

Contrary to petitioner's assertion that the Fourth Circuit's decision in this case conflicts with the "modern view" adopted by the courts, there is an obvious underlying uniformity in the decisions of the Second and Fourth Circuits as illustrated by the *Osbourne* and *Scarborough* cases. The instant litigation involved entirely different issues and facts and was properly decided by the Fourth Circuit. The Circuit Court applied the law established by this Court in *Western Fuel Co. v. Garcia,* supra, to the particular facts of this case.

This principle of applying the limitation of a State Death Act is uniformly recognized. *Benedict on Admiralty,* 6th Ed. Vol. 1, page 392, states:

> "A suit in admiralty, brought by virtue of a state statute, to recover damages for death, is subject to the limitations of the statute on which the right of action rests. *The limitation by the State Statute of the time within which an action may be brought thereunder is observed in Admiralty."*
>
> *The HARRISBURG* (1886) supra
> *Western Fuel Co. v. Garcia* (1921) supra
> *Boyd v. Clark* (1881), 8 F. 849
> *Williams v. Quebec SS. Co.* (1903), 126 F. 591
> *Swanson v. Atlantic Gulf & Pac. Co.* (1907), 156 F. 977.

The application of the limitation of the State Statute neither results in a displacement of the characteristic features of the maritime law nor an impairment of the uniformity in admiralty practice. While matters of pleading, practice and evidence will be governed by the rules of admiralty (*Steamboat Co. v. Chase,* 16

Wall. 522, 21 L. Ed. 369), "the admiralty courts do not find in the State Statute a more enlarged right than do the State Courts". (Benedict on Admiralty, 6th Ed. Vol 1, page 393).

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied

There are several reasons why the petition for certiorari should be denied.

The sole issue raised by the petition has already been answered and determined by the Supreme Court of the United States. There is no conflict between the decisions of the Court of Appeals, the District Court and the opinions of this Court in *The Harrisburg* and *Western Fuel Co. v. Garcia.*

There is no conflict of authority as to the basic legal principle involved. There are no new or novel questions presented by this litigation needing further clarification. There is no question of general interest warranting the granting of a writ of certiorari in accordance with the petitioner's application.

For these reasons, the decrees of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the Eastern District of Virginia should not be disturbed and a writ of certiorari should be denied.

Respectfully submitted,

THOS. M. JOHNSTON
Of Counsel

March 23, 1953
HUGHES, LITTLE & SEAWELL
936 Wainwright Building
Norfolk, Virginia